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No. 84-906

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

GARY CARSON

v.

AMERICAN TELEPHONE AND
TELEGRAPH TECHNOLOGIES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX

Submitted by:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Gary Carson :

Plaintiff :

v. :

Case No. C-2-77-970

Western Electric Co.: Inc., et al.,

:

Defendants

:

OPINION AND ORDER

Plaintiff brings this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., as well as 42 U.S.C. §1981, to remedy certain acts of employment discrimination he alledgely suffered at the hands of his former employer. Specifically plaintiff claims that defendant discriminated against him by failing to protect him adequately from racial harassment on the part of fellow employees, by disciplining him in a discriminatory manner, and ultimately by

discharging him from his job. Plaintiff's former union was also included in the complaint.

The case was tried to the Court for nine days, beginning on March 1, 1982. At the close of plaintiff's case-in-chief, the Court granted the defendant union's motion to dismiss the claims against it pursuant to Rule 40(b) of the Federal Rules of Civil Procedure. Plaintiff and the remaining defendant have submitted their separate post-trial memoranda, and the case is now ripe for a decision on the merits. The Court's findings of fact and conclusions of law follow. Fed. R. Civ. P. 52(a).

I

Plaintiff Gary S. Carson is a black male, who, at the time of trial, was approximately 35 years old. Defendant Western Electric Company, Inc. is the manufacturer of various electrical com-

ponents, and it maintains a large plant in Columbus.

Carson was hired by Western Electric as a Grade 33 cableformer in 1964. His job consisted primarily of assembling large electrical cables. He worked at the Columbus plant for nearly nine years without significant incident. By November 1973 he had been promoted to Grade 35, one grade below the highest level cableforming position.

From 1973 until his discharge in the spring of 1978, however, Carson's employment at Western Electric can best be described as troubled. In March 1973 while Carson was working in the main cableforming mezzanine, John Ransom, a co-worker, alledgely directed a racial slur at him. When Carson complained about the incident, a supervisor investigated it and arranged a meeting between company officials and the two individuals involved. Ransom was

warned that if the epithets continued he could be discharged. Afterward, a memo written by the supervisor was attached to the personnel files of both Ransom and Carson. In it the supervisor suggested that Carson was as much at fault for the confrontation as was Ransom. After Carson filed a complaint with the Ohio Civil Rights Commission (OCRC) over the memo, it was removed from his file voluntarily by Western Electric.

In November 1973, the cableformers and other Western Electric employees at the plant engaged in an unauthorized wildcat strike. Carson chose not to participate in the strike, and, along with a number of others, he crossed the picket lines to work. After the strike he and many of the non-participants began to experience rather pointed harassment from the former strikers. In Carson's case, this abuse took on a decidedly racial tenor. Racially

derogatory newspaper clippings were left at his work station, as was a plastic gorilla and a wooden cross with scorch marks on it. In addition, wet shellac was placed on his chair, tools were removed from his workbench and raw eggs or banana peelings were thrown in his direction occasionally even hitting him.

At about this same time Carson was involved in an incident wherein an employee named Cuccio held the elevator doors shut so that Carson was unable to exit. Cuccio was caught in the act by supervisor Rudy Drabick, and, according to Western Electric, was given a verbal reprimand in the presence of a union representative.

Aware generally of this harassment, department chief William Morris arranged for Carson to be transferred from the main mezzanine to the "5A area" on the main floor. This area was designed to handle special orders, and only a few cable-

formers worked there. While in 5A, Carson apparently experienced little or no harassment from his fellow workers. In February of 1974, however, Morris moved Carson back to the mezzanine. Morris testified that he ordered the transfer because production quotas on the mezzanine were being increased, and because he felt that the cableformers' ill will toward Carson had simmered down sufficiently.

As soon as Carson returned to the mezzanine, though, the harassment began anew. Carson then contacted Eva Ball, an EEO representative, to complain both about his co-workers and about his supervisors' failure to do anything to protect him. Ball arranged meetings with at least two of Carson's supervisors to discuss the problem. At each of these meetings Ball was informed that little else had been done to protect Carson because the supervisors generally were unable to identify the cul-

prits, except in the case of Ransom and Cuccio.

Company officials did not totally ignore Carson's renewed problems, however. Shortly after Carson returned to the mezzanine, Morris had Carson's work station moved closer to his, so as to prevent further harassment, or at least to identify the guilty parties. Later Carson's station was moved next to the desk of his direct supervisors, and they were told by Morris to be on the lookout for individuals attempting to disturb Carson. Finally, in late May of 1974, Morris called a special meeting of all the employees in Carson's section; he angrily warned them that further harassment of Carson would not be tolerated, and that anyone caught at it would be terminated immediately. It is not clear from the record whether any of these actions had any appreciable effect on either the frequency of the severity of

abuse suffered by Carson.

During this same period Carson began to run into disciplinary problems. While working in 5A, he received one verbal warning from supervisor Jim Ratliff, all pertaining to poor quality work. In mid-February 1974, Carson received a one-day suspension without pay for his work on one particular project. According to the report filed by his supervisor, Carson had been assigned in late January to a cable-forming job that was supposed to take only four days. It took twelve days to complete the project, and when it was checked by quality control personnel they found over 900 defects in it all presumably caused by Carson. Carson filed grievances with the union and a discrimination charge with OCRC over the suspension. He apparently was not successful in getting the discipline revoked, however.

On May 2, 1974, Carson was again

disciplined, this time for being away from his work area. According to Carson's supervisor, Norman Chappelear, the discipline came during an overtime period when the cableformers were deluged with back orders. Chappelear had received a call from the wiring department complaining about the fact that a cable which had been assigned to Carson had not arrived yet. When Chappelear went to talk to Carson about the project, he could not find Carson. He testified that he waited for approximately 12 minutes before a scheduled break and for approximately 5 mintes thereafter before Carson showed up. Chappelear then gave Carson a verbal warning for being away from his work station.

Later that day, Chappelear reviewed the employee efficiency reports for the previous month and found that Carson had the lowest efficiency rating in his group. At the end of the day he gave Carson an

efficiency warning. According to Western Electric it was company policy at that time to give such a warning to the cable-former with the lowest efficiency rating for each month. Carson received a similar warning on June 10, 1974, after Chappelear had reviewed the efficiency figures for May.

Western Electric's records show that on May 13 Carson was placed on "Restriction 51" by the company's medical staff. According to a doctor in the medical department, this work restriction was designed for employees suffering from nervous disorders, and it called for supervisors to make sure that the affected employee was exposed to as little nervous tension as possible. Carson remained on this restriction until May 29.

On June 20, department chief Morris called a meeting with Carson to discuss his low efficiency rating. Also present

were Chappelear and two union stewards. At the meeting it was agreed that the two efficiency warnings Carson had received from Chappelear should be revoked because Carson had been on Restriction 51 for a portion of that time. Morris refused to void the May 2 warning for being outside the work area, however. He also told Carson that if he could not perform all that was required of him as a Grade 35 cableformer, even during the times he was on Restriction 51, then he should consider either taking a downgrade or asking the placement department to find another job within the company for him.

The next day Carson produced a medical certificate from his personal physician indicating that he had a peptic ulcer. He was given sick leave by the company's medical department, and he did not return to work until September 16, nearly three months later. During his absence he

received full pay under the company's sickness/disability benefits plan.[1]

Upon returning to the plant, Carson worked for approximately three months without serious incident. On December 19, however, he was given a verbal warning by Rudy Drabick, a plant supervisor, for poor efficiency. Drabick testified that he had observed Carson's work habits closely, and that he believed Carson's low efficiency rating stemmed from his leaving his work station to talk with friends on the phone or with other employees. Drabick also testified that he had spoken to Carson previously about the problem, and that Carson had complained about not having the proper tools. When Drabick saw to it that more tools were given to Carson, though, there was no noticeable improvement in efficiency.

On January 15, 1975, Carson was again warned by Drabick. This time the warning

was written, and it prompted a meeting between Carson, Drabick and a union representative. A memorandum was issued by Drabick in which Carson's work performance since the previous warning was deemed to be "unbelievably low"; it was noted further that he had an efficiency rating of 16% in contrast to the group average of around 75%. Carson was warned that further low efficiency could lead to additional disciplinary action, including discharge. The next day he obtained a Restriction 51 limitation from a company doctor, and several days later he left work on a sick leave, again suffering from his peptic ulcer and anxiety.

On March 20, 1975, Dr. Dudley Briggs, Western Electric's medical director, called Carson's treating physician and was informed that Carson could return to work at the end of the month. According to the records kept by the department, however, Carson appeared there on March 31, with a

note from his doctor dated March 18; it stated that Carson "should not return to work until released." Carson then left. The next day he was notified by the medical department that he should either produce a more specific medical statement extending his time off, or else return to work immediately. Carson did not produce an additional statement, and on April 2 he was examined by Dr. Briggs. Dr. Briggs determined that Carson's ulcer was not bleeding or perforated, and he concluded that Carson was able to return to work. He told Carson that he would have to come back to work unless he could produce evidence of "further differing opinion." No such evidence was offered, and on April 4 Carson was sent a telegram notifying him that he had been terminated.

In response to the discharge, Carson's union filed a grievance on his behalf. In addition, Carson filed a discrim-

ination claim with OCRC, alleging that his termination was racially motivated. Although the company initially rejected the grievance, it later reversed itself and reinstated Carson with full back pay on September 9, 1975. Charles Brumfield, Western Electric's industrial relations manager, testified that the reversal came about not because the company felt the discharge was unwarranted, but because negotiations were then under way with the union over a proposed third-party physician procedure for medical disability claims. According to Brumfield, Carson's case was the type of dispute to which this procedure would probably apply, and he feared that the union would use it as a test case in arbitration to force the company to accept the union's version of the package. As he put it: "to be quite honest, rather than have the arbitrator write the third-party routine for me, I decided

to reverse this case and write the third-party routine with the help of the Union, rather than outside parties." (Tr. VI-161.)

Upon his return to the plant, Carson was assigned to the Reclamation Area, a department which was designed primarily for employees who were under some sort of partial disability or work restriction. Workers in this department generally did odd jobs such as sorting parts, disassembling improperly manufactured products, or completing mescellaneous paper work. They were allowed to work at their own pace and were not subject to quality of efficiency standards.

Notwithstanding the relatively stress-free environment of the Reclamation Area, Carson continued to experience medical and disciplinary problems. After he had been back at the plant for only a month or so, he again left work under the company's benefits plan, this time on the basis of

a psychiatrist's finding that he was having an "adjustment reaction to adult life." He missed 29 days of work and returned in late November 1975. In February 1976, Carson allegedly suffered a back injury and was again off work on disability leave unitl mid-April.

When Carson returned to the Reclamation Area, he was, according to his supervisor there, somewhat of a problem. The supervisor, Richard Fowler, testified that Carson refused to do anv meaningful work and was constantly out of the work area, talking to or pestering other employees. Fowler gave Carson a verbal warning for his conduct on May 18, 1976, and he issued a written warning three days later when it appeared that Carson had not heeded the first one. The written warning was later reduced to verabl warning when union officials complained that they had not been properly notified of the May 18 discipline.

During the months that followed, Carson was again absent from work due to his back problems.[2]

At about this time, Western Electric closed down the Reclamation Area permanently. Shortly after Carson returned to work, he was thus assigned to his old cableforming job on the main floor of the plant. During an overtime period on August 26, 1976, Carson was observed by Charles Barnette, his acting supervisor, walking into the restroom with a newspaper under his arm just after the end of an authorized break. Barnette testified that Carson remained in the restroom for 35 to 40 minutes. When he came out, Barnette questioned him about what he was doing in there, and Carson allegedly replied that it was none of his business. Barnette then indicated to Carson that he would not be paid for the time he was in the restroom; later Barnette recommended that Carson be

suspended for three days because of his remarks.

A two-day suspension was approved the next day by Barnette's department chief. When Carson was informed of the suspension, according to Barnette, he laughed sarcastically and shook Barnett's hand, thanking Barnette for giving him two days off with full pay. Barnette explained that the suspension was without pay, but Carson assured him that he would be paid eventually. Sometime later Carson filed a charge with OCRC over the matter, but it is not clear from the record whether the dispute was ever resolved.

From August 31, to September 14, 1976, Carson was off work under the benefits plan for "ulcer disease." Shortly thereafter he again left work for approximately four months; the company's records indicate that this latter absence was due to "adjustment reaction to adult life--paranoid personal-

ity." Carson returned in January 1977 and worked until May of that year, with the exception of 20 days he spent on sick leave for back problems.

On May 13, 1977, Dr. Briggs received a letter from Dr. Evan Halas, Carson's personal psychiatrist. Halas noted that Carson had not been taking his medication lately and that he had kept his appointments with Halas only sporadically. Halas wrote further:

> Recently his persecutory ideas became so strong that he felt that he should retaliate and violence was very much on his mind. I feel that we are dealing here with more than just a paranoid personality disorder or an adjustment reaction to a work situation. I strongly feel that he is potentially dangerous, that he is suffering from a schizophrenic disorder of paranoid nature and I would recommend that you would take all the precautionary measures as far as his fellow workers are concerned and also to consider him strongly as a candidate for disability retirement based upon mental illness.

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Dr. Briggs apparently disagreed with this diagnosis, and the matter was referred to Dr. H.J. Leuchter pursuant to the third-party doctor procedure then in effect. Leuchter overruled Briggs, writing that:

> Mr. Carson is disabled. It is conceivable that he may have been able to perform marginally for short periods of time during the last 3 years. His basic character structure may be described as passive aggressive, characterized by both passivity and aggressiveness expressed passively by obstructionism, procrastination, intentional inefficiency or stubbornness. He is too insecure to express anger more directly and frequently projects anger on others mostly persons in authority. Slight stress tends to produce a decompensation into a paranoid personality characterized by hypersensitivity, rigidity, unwarranted suspicion, jealousy, envy, a tendency to blame others and ascribe even motives to them.

On the basis of these findings, Western Electric granted Carson a disability leave, effective retroactively from May 9, 1977. Under the terms of the benefit

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plan which governed such leaves, Carson was entitled to receive full pay for the first six months of his absence and half-pay for another six months.

On December 15, 1977, approximately one month after he had dropped to half-pay under the benefits plan, Carson commenced this lawsuit. A few days later, he appeared at the company's medical department asking to be reinstated. In support of this request he presented a letter from Dr. Halas stating that his condition had improved to the point where he was now able to work effectively again.

In light of Dr. Halas' findings several months earlier, Dr. Briggs felt that some follow-up was necessary before allowing Carson to come back to work. Briggs called Halas a few days later to inquire as to the basis for the new diagnosis. Halas told him that he had seen Carson only a few times since May, and that Car-

son, to the best of his knowledge been attending therapy sessions at the Columbus Mental Health Clinic (CMHC). Halas followed up the conversation with a letter dated January 12, 1978. In it he indicated that his recommendation of December 9 was based in part upon Carson's expressed desire to return to work. He also noted that Carson should be required to attend more therapy sessions at CMHC as a "mandatory" condition of his re-employment at the plant.

Briggs contacted Carson to obtain permission from him to examine his medical records from CMHC. According to Briggs, Carson agreed at first but later changed his mind. Through counsel, Briggs then attempted to procure the records from Carson's trial attorney. These efforts were fruitless. Briggs also tried to have Carson examined by Western Electric's corporate psychiatrist from New York, Dr.

Howard Hess. An interview with Carson was arranged, but had weather forced its cancellation.[3]

Finally, Briggs asked Carson to see Dr. Leuchter again so that Leuchter could help him in determining Carson's fitness for work. Carson refused. Western Electric's trial attorney then informed Carson's lawyer, who was later replaced by present counsel, that unless further medical information was forthcoming, Carson would be terminated pursuant to company policy when his benefits ran out in May. The attorney for Western Electric testified that at this point he and opposing counsel agreed to have Dr. Leuchter resolve the matter. According to him, Carson was to be examined by Leuchter, and Leuchter's findings would be binding on both sides.

On March 30, 1978, Carson visited Dr. Leuchter. After the examination, however, Carson hand-delivered a note to Leuchter's

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office forbidding him to release any information regarding the interview to anyone. Leuchter thereupon refused to turn over his findings, and when defense counsel objected, Carson's attorney proposed that Carson be examined by a psychiatrist of his own choosing, Dr. Korb, who would then release to Western Electric both Dr. Leuchter's findings and his own. According to the testimony of defense counsel, he agreed to this proposal on the condition that Korb's report would not be binding, and that it would be submitted to the company along with Dr. Leuchter's analysis no later than May 5, 1978. Carson was examined by Korb on May 4, but due to confusion among counsel over who was supposed to supply Leuchter's report to Korb, Korb's findings, which were inconclusive, were not submitted to Western Electric until June 19. Leuchter's report was never turned over.

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Meanwhile, Briggs met with an authorized delegate of the Columbus Area Benefits Committee (CABC), the body responsible for determining whether disabled employees should be terminated. Based on the available medical data, Briggs reported that in his opinion Carson's illness was chronic and the prognosis for his eventual return to work was poor. Under Western Electric's benefit plan, it was customary for an employee with less than 15 years of service to be terminated when his sickness disability benefits expired and it appeared that his disability would continue indefinitely. The CABC delegate therefore recommended Carson's termination, and on May 14, 1978, this recommendation was accepted by the full committee. Carson was informed of the decision a few days later. At that time he was also informed that he might be eligible to receive long-term disability benefits under the company's disability

insurance policy. Carson declined to apply for such benefits, and shortly thereafter he amended his complaint in the instant litigation, charging that his termination was recially motivated. In turn Western Electric filed a counterclaim for damages it suffered as a result of Carson's failure to abide by the agreement he allegedly made to have the matter of his return to work resolved by Dr. Leuchter.

II

It has long been the rule that a plaintiff claiming disparate treatment on account of race must prove "by a preponderance of the evidence that the defendants intentionally discriminated against (him or her)." Grano v. Dept. of Development, 637 F.2d 1073, 1081 (6th Cir. 1980). See also, Teamsters v. United States, 431, U.S. 324, 335-36 n.15 (1977); Carter v. Perry, No. C-2-77-89, Opinion and Order (S.D. Ohio, June 29, 1982) (Duncan, J.). As the Sixth Circuit has observed:

> A disparate trestment theory is very different from (a) disparate impact theory. A Title

> VII case alleging disparate treatment simply states that the defendant failed to hire or failed to promote (or otherwise treated a person differently) because of his or her race, religion, national origin or sex. The reason why the employer acted as he did is crucial. Where a Title VII case is brought under the disparate treatment theory, the plaintiff must prove discriminatory intent.

Grano, 637 F.2d at 1081.

Proving discriminatory intent by direct evidence is an onerous task, however, and it is incumbent upon the Court to analyze the charges in light of all the surrounding facts and circumstances. Id. at n.7. To facilitate this process, the Supreme Court has developed a tripartite allocation of the burden of proof in all disparate treatment cases:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to

> articulate some legitimate, non-discriminatory reason for the employee's rejection." [McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)]. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by the preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981).[4]

Where, as here, the alleged discrimination arises in the course of plaintiff's employment, a prima facie case can be established simply by showing "that [plaintiff] is a member of a class entitled to the protection of Title VII, and that he [or she] is accorded treatment different from that accorded persons otherwise similarly situated who are not members of the class." Potter v. Goodwill Industries of Cleveland, 528 F.2d 964, 965 (6th Cir. 1975); Hall v. Ledex, No. 80-3588, slip

op. at 3 (6th Cir. Jan. 15, 1982); Carter v. Petry, supra, at 3. A prima facie showing raises the presumption of intentional discrimination. See Burdine, 450 U.S. at 254; Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

Once a prima facie case has been established, it is up to the defendant to introduce evidence showing there was a legitimate, nondiscriminatory reason for the disparity. Burdine, 450 U.S. at 253. This prong of the Burdine calculus is not as demanding as it might seem at first blush, however, for:

> [t]he defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. . . . If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity . . . .

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450 U.S. at 255.

At this third level of inquiry, the plaintiff must show that the legitimate reason articulated by defendant is mere pretext for a more invidious motivation. As the Court explained in Burdine:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas, 411 U,S, at 304-205.

450 U.S. at 256; see also Hall, supra, at 3; Carter, supra, at 3.

In the present case, Carson's allegations can be divided into three general

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groupings. He claims first that the company failed to afford him adequate protection from the racial harassment directed at him by his co-workers. Second he contends that much, if not all, of the disciplinary action taken against him by various supervisors was discriminatorily motivated. Finally he argues that the company's refusal to accept him back at work in the spring of 1978, and its recommendation to CABC that he be terminated both amount to unlawful discrimination. The Court must therefore examine each of these aspects of his job separately to determine whether or not he has met the burdens of proof imposed on him by McDonnell Douglas and Burdine.

III

A. Failure to Protect from Harassment

There is no question that Carson suffered real and rather prolonged harassment by fellow cableformers in late 1973 and early 1974. Though much of the abuse

appears to have been generated by Carson's non-participation in the strike action of November 1973, it was distinctly racial in character. Carson does not seek to hold the company legally responsible for each and every incident of racial abuse directed at him, but he contends that Western Electric treated him less favorably than white strikebreakers who experienced similar types of harassment from those who had supported the strike.

Oridnarily an employer is not accountable under Title VII or 42 U.S.C. §1981 for individual acts of discrimination engaged in by non-supervisory personnel. Crocker v. Boeing Co. (Veritol Div.), 437 F. Supp. 1138, 1191-92 (E.D. Pa. 1977); Howard v. NCR Corp., 388 F. Supp. 1177 (S.D. Pa. 1977). Where management is aware of the problem, however, it may be found to have tacitly condoned the invidious discrimination if it failed to investigate

alleged harassment adequately or if it refused to take reasonable steps to protect the victims against future abuse. DeGrace v. Rumsfield, 614 F. 2d 796, 803-804 (1st Cir. 1980); United States v. City of Buffalo, 457 F. Supp. 612, 631-631 (W.D. N.Y. 1978). A Title VII plaintiff may thus establish a prima facie case under Burdine and McDonnell Douglas if he or she can show that the company's response to incidents of classbased harassment was somehow less favorable than its response to abuse or harassment that was not class-based.[5]

At trial Carson produced evidence to show that two white co-workers who were also being harassed for non-participation in the wildcat strike, Rita Jessup and Shirley Brewer, were permanently transferred away from the cableforming mezzanine to another part of the plant in order to protect them from further abuse. Carson, however, was transferred to Department 5A

from the mezzanine for only eight to ten weeks. It thus appears that Carson was treated somewhat differently in this respect than were similarly situated white employees.

In rebuttal the company produced evidence establishing that both Jessup and Brewer were cable inspectors, not cableformers. As such, according to the company, they could be moved around to various parts of the plant without difficulty, whereas Grade 35 cableformers were needed only on the mezzanine in February 1974 and thereafter. Carson allegedly could not be transferred elsewhere in the plant without being given another, presumably less attractive job.

Western Electric has thus articulated a ligitimate, non-discriminatory reason for the apparent disparity in treatment accorded Carson vis a vis Jessup and Brewer. Carson, moreover, has failed to convince the Court that this articulated reason is

is pretextual. There is no evidence that Morris' decision to transfer Carson back to the mezzanine was motivated by anything other than the fact that Carson was needed there due to increased production quotas. Morris' belief that Carson would not be harassed further upon reassignment to the mezzanine may have been naive, but there is no indication that it was held in bad faith or with malice toward Carson. In this aspect of the case, then, Carson has not met his burden of proof.

Carson also argues that the company generally could have taken greater steps to protect him, or at least to discipline those who were persecuting him. As an example, he points to the rather ambivalent memo written by his supervisor in 1973 after he complained about a racial slur from John Ransom. Concededly this memo, as well as Morris' premature reassignment of Carson to the mezzanine in 1974, reflect

some insensitivity on the part of individual supervisors to Carson's predicament, but on the whole the Court cannot say that the company's response to the problem was inadequate as a matter of law. The company clearly did not take every conceivable step possible in dealing with Carson's harassment, but it was not required by law to do so. Title VII and §1981 require only that the company take remedial measures that are reasonable in light of all the circumstances. Id. Under the circumstances presented here, this requirement appears to have been met. The company took affirmative disciplinary action against the two employees it actually caught harassing Carson, and on several occasions supervisory personnel made it clear to the rest of the cable-formers that further abuse would not be tolerated. In addition, Carson, while on the mezzanine, was moved around several times to allow his supervisors to monitor

the situation more closely, and there is little to indicate that they took their responsibilities with respect to his protection less than seriously. The Court therefore finds that Western Electric did not breach its duty under Title VII or §1981 to guard against class-based harassment of Carson. This part of his complaint is without merit.

B.. Disciplinary Action

With respect to the many warnings, disciplinary memos, and suspensions to which he was a party, Carson makes a number of charges. He claims first that much of the disciplinary action taken against him was in retaliation for the charges of discrimination he filed with OCRC. He alleges further that department chief Morirs plotted to "build a record" against him, hoping that it would ultimately lead to his discharge. As evidence he testified that another employee, Richard Kearny, had told

him in 1975 that Morris was "out to get" him.

The Court finds Carson's allegations to be unfounded. Aside from his own testimony, based in part on hearsay, there is no evidence whatsoever that Morris or any of the other supervisors ever had a retaliatory motive in disciplining Carson. Most of them testified that they were not even aware at the time they supervised Carson that he had charges pending with OCRC. Carson's testimony on this point is suspect, moreover. At trial the company produced Carson's alleged source, Kearny, who testified that he had never had any discussions with Morris about Carson or with Carson about Morris' attitude toward him. It is possible that Morris and some of the other supervisors may have been more careful to document disciplinary actions taken against Carson because of his demonstrated propensity to appeal them, but there is nothing

to suggest that the actions themselves were retaliatory.

Carson also claims that the disciplines he received after May 1974 were unwarranted in light of his nervous condition and the work restriction he was under. He acknowledges that there were white employees at the plant who received disciplinary actions similar to his for low efficiency or being outside of the proper work area, but he charges that "Western Electric failed to show, or prove, that [even] one of the disciplined white employees had received Restruction 51 . . . from Western Electric's medical department personnel." Plaintiff's Proposed Findings and Conclusions at 6.

This argument is seriously flawed. Under McDonnell Douglas and its progeny, the burden of coming forward with evidence of disparate treatment is on the plaintiff not the defendant. If Carson is to prevail on this charge, it is therefore up to him

to produce evidence to show that he was treated differently than white employees who were under similar medical conditions and/or work restrictions. He has not produced any such evidence. Indeed, the evidence suggests that although the company was willing to revoke the low efficiency warnings Carson received in May and June or 1974, it did not generally reduce its efficiency expectations for regular cableformers on Restriction 51, nor were such workers allowed to take longer break periods than the others.[6] There is thus no indication at all that Carson was treated any differently than others who were similarly affected.

Carson next takes issue with various specific incidents of disciplinary action. He claims, for instance, that the verbal warning given to him by supervisor Chappelear in 1974 for being out of the break area was discriminatory because neither

Western Electric nor the cableforming department "had a policy or standard . . . outlining what constituted a reasonable period of time that an employee could be away from his job during the time he was to perform assigned duties." Plaintiff's Proposed Findings and Conclusions at 5. Even if true, this allegation falls short of making out a Title VII claim. The focus in Title VII disparate treatment litigation is not company policies or procedures, but rather on how the claimant was treated in relation to non-minority co-workers. See e. g., Dhamani v. Flxible Co,. No. C-2-77-1007, Opinion and Order at 16 (S.D. Ohio, Aug. 2, 1982) (Duncan, J.). Carson has simply failed to show that the verbal warning he received from Chappelear was in any sense more harsh than the discipline given other employees for similar infractions. In fact, Western Electric has produced the names of at least three white

employees who received the same type of discipline for being away from their work areas or otherwise not working.

Carson also protests the two-day suspension he received from supervisor Barnette in August 1976 for reading a newspaper in the restroom. Carson contends that the suspension was unduly harsh, and that it was more severe punishment than that which he would have received had he been white. In support he offered the uncorroborated testimony of a fellow worker who witnessed the incident, and who testified that white employees often used the restroom for more than a half-hour without being disciplined.

Notwithstanding this testimony, the Court finds that Carson has not established a prima facie case on this issue. Western Electric has produced verified records showing that at least three white employees were similarly disciplined for loitering or

taking unauthorized breaks during 1976. It thus appears the Carson was treated no differently than his white co-workers, at least not with respect to this particular incident. The Court believes, moreover, that the discipline was fully justified in light of the fact that the violation occurred during an overtime period for which Carson was receiving higher pay, and in light of Carson's rather belligerent behavior toward Barnette when confronted by him.

Lastly, with respect to the discipline Carson received in 1975 from supervisor Drabick for poor work efficiency, Carson contends that he was "set up" by Drabick. As proof he produced a white cable inspector, William Ralph, who testified that Drabick had ordered him on at least one occasion to check Carson's work against a production order that had been amended after Carson completed the job, thereby

inflating the number of erros attributable to Carson, Ralph also testified that Drabick had him check Carson's work at least once or twice a day, much more often than was normal for other workers.

If true, this testimony would go far in establishing a prima facie case for Carson. The Court has serious doubts about Ralph's veracity, however, On cross-examination it was established that Ralph was somewhat of a disciplinary problem himself, having incurred a number of disciplinary actions for poor work application. Ralph also testified that he has several workers' compensation claims currently pending against the company, and that he and Drabick had had at least one "run-in" while Ralph was employed at the plant. It thus seems that Ralph has a bit of an axe to grind against both Drabick and Western Electric, and based on its own observation of Ralph's demeanor at trial, the Court

chooses to attach little significance to his testimony.

Even if Ralph was wholly credible, his testimony alone would not be sufficient to support Carson's claim of recial discrimination. Ralph testified on direct examination that he himself had been "set up" by Drabick sometime after the Carson episode. This suggests that the alleged abuse by Drabick if it occurred at all, was motivated more by contempt for slow or disobedient employees in general than by animosity toward black workers or Carson in particular. As has been noted above, the plaintiff in a Title VII case bears the ultimate burden of proving intentional discrimination on the part of his employer, or at least his immediate superiors. With respect to Drabick, Carson has not accomplished this admittedly difficult task.

The remainder of Carson's discipline-related claims are likewise without merit.

It is clear that Carson was disciplined by his supervisors more often than most white employees at the plant; it also appears that these supervisors were at times less sympathetic to Carson's personal problems than might be desired. The Court can find no instance on the record in which the discipline received by Carson was undeserved, however. Additionally, the Court is convinced, after having had ample opportunity to observe Carson on the stand and throughout the course of this litigation, that many of his problems with the supervisory staff were exacerbated, if not caused *in toto*, by his own intransigence and refusal to accept responsibility for poor job performance. Perhaps Carson's misconceptions stemmed in turn from the emotional disorders he was suffering from during these years, but there is little evidence that the discipline he received was racially motivated.

C. Termination

In his third group of claims, Carson contends generally that the decision to terminate him and to deny him long-term disability benefits or a disability leave of absence was discriminatory in nature. To support this charge, he relies on a number of individual events leading up to the discharge. He points first to Dr. Briggs' initial refusal in late 1977 to approve his return to work without further medical records, particularly those pertaining to his treatment at CMHC. At trial he produced evidence to show that two white employees with disabling psychological problems had been allowed to return to work at the plant without having to produce such extensive documentation of their prior treatment.

At first it would appear that Carson has established at least a prima facie case on this aspect of the suit. Upon closer scrutiny, however, the evidence reveals

that the circumstances surrounding each of the cases relied upon by Carson were markedly different from his own. Briggs testified that he had allowed one of the white employees, Ralph Stevens, to return to work simply upon the recommendation of Steven's personal psychiatrist because Stevens suffered from a mental disorder which was significantly less severe than that suffered by Carson. As to the other white employee, Frank Decker, Briggs testified that he had in fact required Decker to sign releases giving Briggs permission to obtain all of his medical records. These releases were produced at trial. Briggs also said that he allowed Decker to return to work because he felt sure from his own observation and treatment of Decker that he knew the precise nature of the malady and the treatment which would be required for it.

The Court finds Briggs' testimony on this point entirely credible. Insofar as

his initial refusal to reinstate Carson is concerned, any difference which may have occurred between his handling of the Carson case as compared to those of white coworkers appears from the preponderance of the evidence to have resulted not from racial animus but rather from the legitimate difference in the cases themselves. Briggs' decision to condition Carson's return on the production of further medical records, moreover, seems eminently reasonable in light of Dr. Halas' rather abrupt seemingly unsupported change in diagnosis. The Court thus believes that Briggs' actions with respect to Carson in late 1977 and early 1978 were taken for the most part in the exercise of his best professional judgment, not for discriminatory purposes.

As further evidence of the alleged discrimination, Carson points to the company's failure to employ the third-party physician procedure in early 1978. Accord-

ing to Carson, Western Electric, by circumventing this procedure, "was able to have the questions of plaintiff's ability to return to work placed in the hands of attorneys at law. Such a maneuver was contra to the intent and purpose of the [procedure] and against past practice." Plaintiff's Proposed Findings and Conclusions at 10.

This argument merits scant attention. In the first place, the company presented evidence to show that the collective bargaining agreement then in effect provided for use of the third-party physician procedure only when an employee's physician felt that the employee could not work, not necessarily when the private physician felt he could work after a prolonged absence. Carson cited no instance in which the procedure had been used in dispute of this latter kind. Second, even if such a procedure had been used previously, the company

ultimately did offer to be bound by the findings of Dr. Leuchter--the same "neutral" physician who had overruled Briggs several months earlier. Ideally, perhaps, this offer could have been made before the lawyers for each side became involved, but the fact that it was not advanced earlier does not necessarily support a finding of racial discrimination.

Carson also attaches great significance to the fact that of the four Western Electric employees to go before the CABC on May 18, 1978--three of whom were white--only he was terminated without a disability leave. Like Carson, each of the three white employees had come to the end of their benefits eligibility period under Western Electric's company plan. Unlike Carson, though, each received some form of disability leave which would have enabled them to return to work upon becoming fit to do so.

The company offered legitimate excuses

for this apparent disparity. It established that in contrast to Carson, two of the white employees had disabilities stemming from job-related injuries. Under company policy employees suffering from injuries allegedly incurred on the job were not ordinarily terminated, at least not until their workers' compensation claims were resolved. As to the third white employee, a Ms. Mowery, it was explained that while she did not have a job-related disability, she was under "severe emotional trauma," and that "closing her out at that time would have had a detrimental effect on her recovery." Defendant's Proposed Findings and Conclusions at 33. Alternatively, the company points out that of the four employees under review, the three that were granted extended benefits all had favorable recommendations from Dr. Briggs. Because of Carson's refusal to cooperate with Briggs in turning over his medical records, however, Carson

did not receive such a recommendation.

Western Electric's distinction between Carson and Ms. Mowery is somewhat curious, for it seems from the record that Carson too was under "severe emotional trauma," and that his termination might also have had a "detrimental effect" on the chances for his recovery. The evidence suggests that the real reason for Carson's termination by CABC was that Briggs recommended it. His motivations in reporting on Carson's case as he did thus lies at the heart of Carsons's allegations.

As has been noted above, the Court generally finds Briggs' testimony to be worthy of belief. His actions with respect to the Carson matter are not wholly above reproach, of course, for he, like Dr. Halas, apparently changed his medical opinion regarding Carson rather drastically within the space of a few months. It is possible, moreover, that Briggs was somewhat irri-

tated either with Carson personally or with the fact that Carson had succeeded in obtaining a disability leave over his objections in May 1977. Nonetheless, based on its assessment of Briggs' demeanor at trial, the Court believes that his recommendation on Carson to CABC was made in good faith and without a discriminatory motivation. Since Carson had refused to produce his records from CMHC or submit to further psychological examinations, Briggs had no basis upon which to doubt his impression that Carson was yet unfit to return to work. Briggs thus had little choice but to report to CABC that Carson was still disabled, and that the prognosis for his recovery was uncertain. The Court therefore concludes that neither Briggs' recommendations nor the CABC action taken thereon were discriminatory.

In this and every other aspect, then, Carson has either failed to make out a

prima facie case under McDonnell Douglas and Burdine, or has failed to rebut the legitimate explanations offered by the company for any apparent difference in its treatment of Carson as opposed to non-minority employees. The Court is not unsympathetic to Carson's charges, however. As was noted above, Carson was in fact the object of rather severe racial harassment from fellow cableformers for his refusal to participate in the wildcat strike of 1973, and this abuse may well have triggered or at least exacerbated some of the psychological problems which Carson experienced later. The Court, moreover, has no doubt that Carson sincerely believes he has been discriminated against by the company and its management corps. Unfortunately for him, the proof offered at trial falls very short of satisfying the increasingly heavy burdens imposed upon Title VII claimants. The Court must therefore find

against Carson on each of his claims.

IV

This leaves only Western Electric's counterclaim for breach of contract. The company contends that Carson, through his attorney, entered into a valid and enforceable agreement to have the dispute between Dr. Briggs and Halas over his return to work resolved by a neutral third physician, Dr. Leuchter. Breach of this agreement, according to the company, resulted in its having to "expend attorneys' fees, costs and other expenses it would not have otherwise had to expend, in order to defend against plaintiff's claim" of discriminatory termination. Defendant' Proposed Findings and Conclusions at 36. The precise amount of damages allegedly suffered by Western Electric is not specified.

This counterclaim necessarily fails for want of proof. At best the terms of the so-called contract were extremely

fuzzy. Although defense counsel testified that he and Carson's former attorney entered orally into a firm agreement to have Carson examined by Leuchter and to be bound by the findings, neither the correspondence which followed the agreement nor the deposition testimony of the other attorney corroborates defense counsel's recollection of the "firmness" of the deal. Furthermore, there is no indication on the record that Carson's attorney had actual or implied authority to enter into an agreement of this kind on Carson's behalf. Even if he did, it is not clear that Western Electric was ever injured by the supposed breach. The company's allegations of injury are implicitly premised on the notion that Leuchter's findings would have supported those of Briggs. Carson's actions subsequent to the examination suggest that this might have been so, but since the findings were never released, their content is

purely a matter of speculation. Western Electric has thus failed to carry its burden of proof, both with respect to the existence of a valid, binding agreement and with respect to a cognizable injury.

V

For these reasons the Court finds in favor of defendant on all of the claims stated in the complaint and in favor of plaintiff on defendant's counterclaim. There being no further claims on the record, the case is DISMISSED. The Clerk shall enter judgment accordingly.

So ORDERED.

Robert M. Duncan, Judge
United States District Court

1 Under this plan, an employee with Carson's seniority would receive full pay for the first 13 weeks of his disability. Thereafter, benefits dropped to half-pay for another 39 weeks. Carson thus returned to work in September 1974, shortly before his benefits would have been cut in half under the plan.

2 Company records show that Carson was on disability leave for his back ailment between April 28 and June 28, 1976. This of course is inconsistent with Fowler's testimony that Carson was at work in May 1976. The company has offered no explanation for this discrepancy, but the Court surmises that the entry in Carson's medical records for April 28, 1976, is in error. The next entry shows that Carson was absent with back problems from June 18 through June 28, 1976.

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3 Dr. Hess did have the opportunity to review Carson's medical file and to talk with Carson's brother, who also worked at Western Electric. On the basis of these contacts alone, Hess wrote a letter to Briggs on February 3, 1978, stating that Carson probably suffered from paranoid schizophrenia, and that "it would be in the best interests of Gary Carson and the Columbus Works if he was considered to be totally and permanently disabled." The Court finds it difficult to believe that such a diagnosis could be properly made without ever having seen or talked to the patient. For these reasons the Court accords Dr. Hess' findings little weight.

4 Although Burdine and McDonnell Douglas both dealt specifically with claims brought under Title VII, the same general analysis applies to §1981 actions. See Long v. Ford Motor Co., 496 F.2d 500, n.11 (6th Cir.

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1974); see also, General Building Contractors Assoc., Inc. v. Pennsylvania, 50 U.S.L.W. 4975 (1982).

5 This is not the only way that a litigant may prove a Title VII claim based on co-worker harassment. Since this type of claim inherently focuses on what the employer failed to do, the proof may not always be susceptible to measurement by way of the framework laid down in Burdine and McDonnell Douglas. Because other workers at Western Electric were subjected to non-racial harassment at about the same time that Carson was, however, use of the Burdine formula is appropriate here.

6 According to the company, Restriction 51 was defined as follows:

> No nervous tension, prohibits employee from working on a job at which he must extend himself considerably and exert intense effort to maintain prop-

> er speed, precision, quality, or other pressures such as a key person on conveyer line [sic], certain types of adjusting and assembly operations where the time element is figured closely.

Tr. V at 73-74. Supervisor Morris testified that Carson was not a "key person" on a conveyor operation, and that he did not do any of the "assembly" or "adjustment" work envisioned by the abovequoted language.

Respectfully Submitted,

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CERTIFICATION

Copies of the foregoing have this 18th day of December, 1984, been forwarded too all parties of record, by regular mail.